From: Steve Burbeck
To: Microsoft ATR
Date: 1/24/02 11:39am
Subject: Microsoft Settlement

First, let me be clear that my views do not represent those of my employer, IBM, in any way.

I read the proposed final judgement in its entirety the day after it was published, and yet again today. It is an artful document. I do not have the legal expertise to appreciate the many subtle uses of legal terms of art presumably put in by the DOJ to place real restrictions on Microsoft's future conduct. But, in the end, this settlement is about how the software industry works. I am enough of a software industry "expert" to see many artful ways that Microsoft has virtually neutered its usefulness in redressing past distortions or in preventing further distortions in the software industry caused by their illegal use of their monopoly position. Here are the three I find most egregious:

1) The restrictions on who can be on the three member technical committee or its supporting staff rule out most competent participants in at least two ways. First, each must be a software design and programming expert. That is a peculiar requirement in this increasingly networked world. Expertise is also needed on networking and Web issues, yet many such experts do not necessarily qualify as software designers and programmers. Restricting all of their support staff to be software designers or programmers is too limiting. I have lived and worked with "design and programming" experts for more than twenty years (and am one myself). Few of them also understand the business, Web, and Internet subtleties that Microsoft wields so well. Second, the restrictions on employment rule out most viable candidates. Of those that meet the technical requirements, nearly all either have recently or soon will work for Microsoft or one of its competitors (note that Microsoft is a competitor of nearly every kind of software firm, not to mention ISP's, banks, travel software providers, game manufacturers, the news media, and many others). The few that have not and do not intend to work in the software industry (e.g., those who do are retired, independently wealthy, or work for military, the steel industry, university, or perhaps some other nonprofit organization) typically have very little understanding of how the software industry works. Between these two restrictions, the Technical Committee will likely not be of very high quality. Microsoft has proven to be very good at fooling those who try to restrict its ambitions. This committee is designed to be easy to fool.

2) The definition of "Microsoft middleware" and "Microsoft middleware products" is both vital to the settlement (since much of the settlement is specific to middleware), and quite peculiar, especially from the perspective of an "expert in software design and programming" such as those who will populate the TC. And Microsoft has demonstrated willingness to manipulate such definitions when they converted IE from a stand-alone product to an integral part of the operating system. Nonetheless, the TC

experts must use this contorted definition instead of their own understanding. Many others have analyzed the middleware definitions and found them wanting as well. All I can say here is that when I first read the definition it was clear to me that Microsoft has won enormous flexibility to determine what is, or is not, middleware. It reminds me of the loophole Microsoft foisted on Ann Bingaman and the DOJ in the '95 settlement that turned out to virtually emasculate that settlement. That blunder did not help the DOJ's reputation. Nor will this one.
3) Even if the above issues are solved, five years is too short a period of oversight. The two year extension for bad behavior does not materially affect the issue. It will take at least ten years.

Regards,
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